

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMEY JONES

Claimant

VS.

WINSTEADS

Respondent

AND

WINSTEADS & WAIDS COMPANY

Insurance Carrier

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Docket No. 255,913

ORDER

Claimant appeals the July 25, 2001, Award of Administrative Law Judge Steven J. Howard wherein claimant was awarded a 10 percent impairment to the body as a whole resulting from the injuries suffered on June 18, 1999, but denied compensation for the March 14, 1999, accident due to claimant's failure to submit timely written claim. Oral argument before the Appeals Board was held on February 13, 2002.

APPEARANCES

Claimant appeared by her attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Mark E. Kolich of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, the parties agreed to provide the Board for its consideration the December 29, 2000, letter from both attorneys to the court ordered independent medical examiner, Edward J. Prostic, M.D., requesting additional information on claimant's functional impairment and how it is attributed to claimant's separate accidental injuries. This letter was provided by the

attorneys to Dr. Prostic at the instruction of the Administrative Law Judge, with Dr. Prostic's January 12, 2001 response letter being directed to Administrative Law Judge Howard.

ISSUES

Did claimant submit timely written claim pursuant to K.S.A. 44-520a?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

Claimant suffered two accidental injuries while working for respondent as a waitress. On March 14, 1999, she slipped and fell, injuring her low back. She notified her supervisor, requesting medical treatment, but was refused medical treatment. Claimant was experiencing shooting pains down her right leg and hip, but continued to work, bearing the pain as best she could. On May 17, 1999, claimant went to the Shawnee Mission Medical Center emergency room on her own.

Claimant continued working until June 18, 1999, although she did change work locations to a different area of respondent's restaurant. On June 18, 1999, claimant suffered another slip and fall when she stepped on a wet floor, falling onto a mop bucket. She again experienced shooting pains down her leg, which she described as the same problem she was having before. She reported this second injury to her supervisor, the shift manager, but again was denied medical treatment. Claimant retained the services of an attorney and was then referred for medical treatment to Business and Industry Health Group for physical therapy and also to Dr. Philip Hylton. Claimant was also provided temporary total disability compensation after the June 18, 1999, fall. No temporary total disability compensation or authorized medical treatment was provided between March 14, 1999, and June 18, 1999.

Claimant underwent surgery on August 16, 1999, under Dr. Hylton's care for a discectomy at L5-S1 on the right. Claimant continued having symptoms and was later diagnosed with epidural fibrosis. She was returned to work with restrictions of no carrying over 40 pounds, no deep bending or twisting and no repetitive lifting. Claimant ultimately left her employment with respondent and is currently working for Ted Manufacturing, making airplane parts. This work pays a comparable wage and is within the restrictions placed upon her by her treating physician. Accordingly, pursuant to K.S.A. 1998 Supp. 44-510e and the stipulation of the parties, claimant is limited in this award to her functional impairment.

The parties have stipulated that written claim was submitted for both accidents on May 26, 2000.

K.S.A. 44-520a specifies:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation

K.S.A. 44-557 states:

(a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.

. . .

(c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

It is acknowledged in the record that respondent failed to provide an accident report for either the March 14, 1999, accident or the June 18, 1999, accident. Therefore, under

K.S.A. 44-557, the time for submitting written claim is extended to one year from the date of payment of compensation or the last day medical care was provided.

The dispute in this matter centers around the medical care provided to claimant and whether that medical care was provided for the June 18, 1999 accident, the March 14, 1999 accident, or a combination of the two. As claimant was still under authorized medical care from the surgery at the time her written claim was submitted, if the medical treatment was for both accidents, then the written claim time under K.S.A. 44-520a would be extended and claimant's written claim would be timely for both accidents.

The only evidence which can be considered by the Board regarding claimant's August 16, 1999, surgery comes in the form of two reports from board certified orthopedic surgeon Edward J. Prostic, M.D. The Administrative Law Judge, in his Order of November 7, 2000, appointed Dr. Prostic pursuant to K.S.A. 44-516 and/or K.S.A. 44-510 as a neutral physician to perform an evaluation on claimant to determine both claimant's functional impairment and any impairment which existed before June 1, 1999. Dr. Prostic was specifically cautioned "[d]o not address causation."

Additionally, the December 12, 2000, report of Dr. Prostic states:

During the course of her employment on or about March 14, 1999, and June 1, 1999, Jamie [sic] L. Jones sustained injury to her lumbar spine with herniation of disc at L5-S1. She has been operated for discectomy. . . . Permanent partial impairment is rated at 15 percent of the body as a whole on a functional basis. This is for the combination of the two accidents.

After the initial December 12, 2000, report was received from Dr. Prostic, the attorneys were instructed by the Administrative Law Judge to again contact Dr. Prostic, requesting additional information. This was accomplished by their joint December 29, 2000, letter which requested a specific designation as to the amount of functional impairment attributable to each of the accidental injuries claimed. Dr. Prostic provided a follow-up report of January 12, 2001, to Judge Howard which specified that while claimant was not good at separating the medical treatment or symptoms, "[a]t least two thirds of the impairment is judged to have occurred from the second accident."

The reports of Dr. Prostic constitute the only opinions in the record regarding claimant's impairment and how that impairment should be distributed between the two accidents.

Dr. Prostic's initial December 12, 2000, report states that claimant suffered injury during the course of her employment on or about March 14, 1999, and June 1, 1999¹, with "injury to her lumbar spine with herniation of disc at L5-S1." It does note that claimant underwent a discectomy, but does not specify whether the discectomy was to correct the problems associated with the March accident, the June accident, or a combination of both. The January 12, 2001, report of Dr. Prostic, in reply to the letter of attorneys Horner and Kolich, also fails to address the necessity for claimant's surgery. That report merely specifies that at least two-thirds of the impairment resulted from the second accident.

In order for claimant's written claim under K.S.A. 44-520 and K.S.A. 44-557 to be timely, the medical treatment provided to claimant after the June 18 injury must relate to both accidents. Otherwise, the written claim submitted by claimant on May 26, 2000, would be out of time with regard to the March 14, 1999, accident.

In considering the record as a whole, the Appeals Board finds that the medical reports of Dr. Prostic do not specify with any clarity a direct causal connection between the March 14, 1999, accident and the surgery performed on claimant after the June 18, 1999, accident. The Board, therefore, finds that the written claim submitted by claimant on May 26, 2000, while satisfying the requirements for the June 18, 1999, accident, fails to satisfy the statutory requirements for the earlier accident.

The Appeals Board, therefore, affirms the Administrative Law Judge's award of a 10 percent impairment to the body as a whole for the June 18, 1999, accident and the Judge's denial of benefits for the March 14, 1999, accident due to claimant's failure to file timely written claim pursuant to K.S.A. 44-520a and K.S.A. 44-557.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated July 25, 2001, should be, and is hereby, affirmed.

¹ The Administrative Law Judge's Order to Dr. Prostic requests his opinion on "a pre-existing impairment before June 1, 1999." As a result, Dr. Prostic mistakenly used June 1, 1999 as an accident date in this matter. The parties acknowledge the dates of accident in contention in this matter are March 14, 1999 and June 18, 1999.

IT IS SO ORDERED.

Dated this ____ day of March 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director